

**IN THE UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS**

Glass Dimensions, Inc. on behalf of the
Glass Dimensions, Inc. Profit Sharing
Plan and Trust, *and all others*
similarly situated,

Plaintiffs,

v.

State Street Corporation, State Street
Bank & Trust Co.,
and State Street Global Advisors,

Defendants.

CIVIL ACTION NO: 1:10-CV-10588 (JLT)

Leave to File Granted March 21, 2013

**PLAINTIFF'S SUPPLEMENTAL AUTHORITY IN SUPPORT OF PLAINTIFF'S
MOTION FOR SUMMARY JUDGMENT AND IN OPPOSITION TO
DEFENDANTS' MOTION FOR SUMMARY JUDGMENT**

In opposition to summary judgment and in seeking summary judgment, State Street Bank and Trust Company ("State Street") argued that it was free to collect a fee of 50% of securities lending income, no matter how unreasonable the amount of that fee, because fiduciaries for plans agreed to it. *See* Memorandum of Law in Support of Defendants' Motion for Summary Judgment ("Defs' Brf.") [Dkt. 110], at 15-18, Defendants' Memorandum Of Law In Opposition To Plaintiffs' Motion For Summary Judgment ("Defs' Opp.") [Dkt 157] at 27-28.

In *Santommeno v. Transamerica Life Ins. Co.*, 12-02782 (C.D. Cal. Feb. 19, 2013), Exhibit A hereto, the court resoundingly rejected State Street's arguments.

First, the court explained that trust law, not contract law, governed whether the defendants' fees were reasonable. *Id.* at 8-9.

Second, the court flatly rejected the proposition that the defendant fiduciaries were free to

collect unreasonable fees simply because they were not fiduciaries when they negotiated the fee.¹ *Id.* at 12-13. As the court explained:

The *reductio ad absurdum* of the principle that a future fiduciary is not responsible for the terms of its own compensation is that the fiduciary could negotiate for a fee of 99% of each separate account and still be considered to be fulfilling its fiduciary duty of managing the separate account simply because it negotiated this fee by contract. The contract can immunize the future fiduciary TLIC from fiduciary breach no more than it can immunize the employer. To hold otherwise would allow fiduciaries to contract themselves out of their duties, so long as it was done prior to the assumption of those duties.

Id. at 13.

Third, even where a contract has supposedly been negotiated at arm's-length (and there is no evidence of that in this case against State Street), the contract does not permit a fiduciary to collect an unreasonable fee. *Id.* at 13-15.

Fourth, the court held that because the defendant fiduciaries had discretion over their fee, as State Street did (and does) here, it was a fiduciary for that purpose and could not escape a claim that the fee was unreasonable. *Id.* 15-18.

In sum, Judge Pregerson rejected every single argument advanced by State Street regarding fiduciary status and contractual entitlement with respect to its unreasonably high fee.

¹ In this case, State Street was, in fact, already a fiduciary when it selected itself and set its compensation. Plaintiff's Reply Memorandum of Law in Support of Summary Judgment ("Plaintiff's Reply") at 5. (On page 5 of Plaintiff's Reply, we make the following citation, *See Pineiro v. PBGC*, 318 F. Supp. 2d 67, 93 (S.D.N.Y. 2003); *see generally* note 2, *supra*. The second citation should be to note 3.

Dated: March 21, 2013

Respectfully submitted,

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Certificate of Service

I hereby certify that this document filed through the ECF system will be sent electronically to the registered participants as identified on the Notice of Electronic File (NEF) and paper copies will be sent to those indicated as non-registered participants on March 21, 2013.

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